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No. _____

In the Supreme Court of the United States

SHIRLEY DIETELBACH,
Petitioner,

v.

OHIO EDISON COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, on summary judgment review of the "'qualified' individual with a disability" issue in an ADA action where the medical evidence conflicts with the discharged employee's "I can do my job" testimony, genuine issue of material fact exists where the employer never provided the employee an opportunity to perform her position's essential functions with or without reasonable accommodation.

PARTIES TO THE PROCEEDING

Petitioner

Shirley Dietelbach, an individual with no corporation affiliations.

Respondent

Ohio Edison Company.

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JURISDICTION

The Sixth Circuit Court of Appeals' Order was entered 1/12/01.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1); and the timeliness of Petitioner's filing is governed by Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §12112(a) states: "**General rule**

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

42 U.S.C. §12111(8) states: "**Qualified individual with a disability**

The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or

interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

STATEMENT OF THE CASE

Hired in 1964, Petitioner, Shirley Dietelbach, was Respondent, Ohio Edison Company's "instrument and test" employee. In 10/95, Petitioner injured her thumbs on the job. Her right thumb was surgically repaired in 4/96 and, with restrictions, Petitioner's doctor, Nahigian, M.D., released her to return to work in 7/96.

Dr. Nahigian would later explain those "restrictions," applicable "until further notice:"

> "If she is happy doing laboratory work without any manipulative heavy demands on her hands, then she should do so. Both hands will not stand heavy factory work or any type of sustained impacts. . . . Can use a splint as needed. . . . I mean, if she's doing light things like working in the lab or testing - I don't know what this instrument testing entailed, if she would use like bulb syringes or any type of dials or things like that, she could use it. Where there's no impact. She's not a cripple . . ."

As to whether Petitioner could return to the type of work she previously performed, Nahigian opined:

> "She could if she wanted to. . . . If she felt, I wasn't going to stop her. My standpoint, I couldn't recommend it and as her physician, I would not advise her to do it."

Respondent's in-house medical consultant, Newman, M.D., then consulted with Dr. Nahigian and "clarified" the latter's thoughts on the subject:

> "Dr. Nahigian confirmed that Ms. Dietelbach has reached maximum medical improvement of her thumb sprain conditions and her subsequent surgical procedures. Therefore, Ms. Dietelbach's conditions will not continue to improve, either functionally or medically. Dr. Nahigian's work restrictions per his note of August 6 were permanent and essentially he did not feel that she could do the routine hand and finger maneuvers necessary for her job as an instrument and test person."

Armed with the Newman, M.D. report, Respondent confronted Petitioner on 11/8/96, advising that she could not do her job anymore and would not get any better. Petitioner disagreed with Dr. Newman's "clarification" and informed Respondent that, with the exception of "samples, jars, ice packs," she had been doing her job. Respondent replied by insisting that the Petitioner needed "accommodations" in another job and to "look at jobs you're qualified for;" suggested that there "may be no job for you;" and demanded that she promptly report back with a list of positions having duties she was qualified to perform.

That "list of positions" never materialized and, on 11/19/96, Respondent terminated Petitioner's employment. The exit interview concluded with Petitioner's assertion that "[I] Can do my job;" however, and without providing her an opportunity to so perform, Respondent's termination decision remained final.

In 1/98, Petitioner brought this action against Respondent in an Ohio state court. On motion and since one of the claims sounded in employment "disability" discrimination under 42 U.S.C. §12112(a) ("ADA"), the case was "federal question" removed to the U.S. District Court for the Northern District of Ohio for disposition. There, on summary judgment in 9/99, the trial court dismissed Petitioner's state and federal "disability" discrimination claims, for failure to establish a prima-facie case of discrimination; and remanded her remaining claims to state court.

From that dismissal, Petitioner timely appealed to the U.S. Court of Appeals for the Sixth Circuit. The appellate court affirmed on grounds that Petitioner had not created genuine issue of material fact on the "qualified individual with a disability" element of the prima-facie case below. In pertinent part, it wrote:

> "Dietelbach never proposed an accommodation. Instead, she simply asserted, without proof, that she could perform the tasks of an Electrical I & T-A, an assertion directly contradicted by all medical evidence. The medical opinions of Dietelbach's physician, Dr. Nahigian, and of Ohio Edison's medical consultant, Dr. Newman, were the only evidence presented on the subject of Dietelbach's ability to perform the essential functions of her job."

From that affirmance, Petitioner appeals to this Court for plenary review.

ARGUMENT

The U.S. Court of Appeals for the Sixth Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled By This Court.

On the issue as to whether the discharged employee is a "qualified individual with a disability" within the meaning of 42 U.S.C. §12111(8), summary judgment appears appropriately dispositive where the medical evidence coincides with the employee's own testimony that (s)he "is totally disabled" or "cannot perform the essential functions of" the position in issue. *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996); and *Weiler v. Household Finance Corp.*, 101 F.3d 519 (7th Cir. 1996).

But the same disposition may not be appropriate where the medical testimony conflicts with that of the employee who insists that, "I can do my job!" Presumably, the discharged employee is competent to testify on the subject of his/her ability to perform the essential functions of his/her own position. And, on its face, such would appear to create genuine issue of material fact for Civil Rule 56 purposes. Or, should such testimony be given no weight as a "[simple assertion], without proof," as characterized below?

This case provides the Court an opportunity to decide two (2) important questions of federal law, heretofore unresolved:

(1) It presents the question "whether courts should defer to the reasonable medical judgment of private physicians on which an employer relied," left open in *School Board of Nassau County v. Arline*, 480 U.S. 288, 94 L.Ed.2d 307, 107

S.Ct. 1123, fn. 18, noted in *Bragdon v. Abbott,* ___ U.S. ___, 141 L.Ed.2d 540, 564, ___ S.Ct. ___ (1998); and

(2) It invites the Court to craft a fair and pragmatic method for resolving the tension created by conflicting medical and employee "qualified individual" testimony on summary judgment, to wit: Where the medical evidence conflicts with the discharged employee's "I can do my job" testimony on the "qualified individual with a disability" issue, the employer will only be entitled to judgment as a matter of law if it had first provided the employee the opportunity to perform the position's essential functions and the employee failed to so perform.

CONCLUSION

For these reasons, the Court should grant certiorari.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed January 12, 2001]

No. 99-4245

SHIRLEY DIETELBACH, *Plaintiff-Appellant*,

v.

OHIO EDISON COMPANY, *Defendant-Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: JONES, BOGGS, and SILER, Circuit Judges.

PER CURIAM. Plaintiff Shirley Dietelbach filed suit against her employer, Ohio Edison Company, alleging "disability" discrimination under the Americans with Disabilities Act ("ADA"). The district court granted Ohio Edison's motion for summary judgment because Dietelbach failed to establish a prima facie case of discrimination. Dietelbach appeals that grant of summary judgment. We affirm.

I. BACKGROUND

Dietelbach began working at Ohio Edison's Niles, Ohio power generating plant in 1964. As of June 1995, she worked as an Electrical Instrument & Test Person ("Electrical I&T-A") at the plant. Many of an Electrical I&T-A's duties, such as splicing cable, performing rigging work, and handling heavy electrical equipment, required substantial use of one's hands.

In October 1995, Dietelbach suffered work-related injuries to both of her thumbs. Because of those injuries, she was later placed on modified light duty and assigned various light duty tasks. Dietelbach did not perform the full duties of her job or of any job at the plant and, instead, she was given low impact duties that were pulled from other full time workers and assigned to her. Under modified light duty, she performed job demonstrations, worked on recorders, and worked in the lab.

In April 1996, Dr. Stanley Nahigian, a hand surgeon, operated on Dietelbach's right thumb. After her operation, she did not return to work until July 1996. When she returned to work. Dr. Nahigian restricted her activity to "suitable one-handed duty." In August 1996, he further restricted her activity. She could no longer open valves, climb ladders, work on small instruments, lift more than five pounds, and use a small screwdriver or pliers with her right hand. She was permitted to work on small instruments and records and to use a screw driver and pliers -- but only with her left hand.

After Dr. Nahigian's August proscriptions on Dietelbach's work activities, Ohio Edison's medical

consultant. Dr. Timothy Newman, spoke with Dr. Nahigian about Dietelbach's situation. In a memorandum summarizing his conversation with Dr. Nahigian, Dr. Newman wrote that Dietelbach's August restrictions were to be permanent because her condition would show little or no improvement. Dietelbach's thumb injuries had reached maximum medical improvement. In Dr. Nahigian's opinion, Dietelbach could not perform the routine hand and finger maneuvers necessary for her position as an Electrical I&T-A. Dr. Nahigian said that he would not advise her to return to work as an Electrical I&T-A but that, if she wanted to, he could of course not stop her from doing so.

Based upon the opinions of Drs. Nahigian and Newman, Ohio Edison determined that Dietelbach was unable to perform the duties of any job available at the plant. In December 1996, Ohio Edison informed Dietelbach about early retirement and disability options. She was terminated effective January 1997, and she subsequently filed for and received Social Security disability benefits for her thumb injuries.

After Dietelbach filed suit against Ohio Edison in Ohio state court, it was subsequently removed to federal district court. The district court granted Ohio Edison's motion for summary judgment on the grounds that Dietelbach was unable to show that she had a "disability" under the ADA, and / or because she was not qualified to perform her job.

II. STANDARD OF REVIEW

We review a grant of summary judgment de novo. *See Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir. 1996).

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

III. DISCUSSION

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees . . . ." 42 U.S.C. § 12112(a). In the absence of direct evidence of disability discrimination, a plaintiff may seek to establish a prima facie case of discrimination and, in fact, has the burden of establishing that prima facie case to overcome summary judgment. *See, e.g., Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 810 (6th Cir. 1999). The prima facie case that a plaintiff must establish to defeat an employer's motion for summary judgment in an ADA case is that the plaintiff 1) is an individual with a disability; 2) is qualified to perform the job requirements; and 3) either has been denied reasonable accommodation for her disability, or subjected to an adverse employment decision solely because she is disabled. *See Roush*, 96 F.3d at 843. Summary judgment is properly granted where a plaintiff fails to produce evidence creating a genuine issue of material fact as to any of the essential elements of her prima facie case. *See Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995).

Because we find that Dietelbach was not able to perform the essential functions of her job, we need not reach

the issue of whether or not she was "disabled" within the meaning of the ADA.

Qualified Individual

The ADA defines the term "qualified individual with a disability" to mean an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). An individual who cannot perform the essential functions of a job is not qualified and, in such cases, the ADA does not come into play. It is irrelevant that the inability to perform essential functions is due entirely to a physical impairment. *See, e.g., McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) (holding that an employee's carpal tunnel syndrome prevented her from performing her assembly line job, but that she was not disabled under the ADA).

A disabled employee has the initial burden of proposing an accommodation. *See Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996). But this court has recognized a subcategory of claims "in which the plaintiff is not seeking a reasonable accommodation but is instead making the straightforward claim that he or she can in fact function capably in the . . . position as it exists." *Id.* at 1182. In such cases, the plaintiff maintains the burden of establishing that she is qualified for the position in dispute. *See id.* at 1182-83.

The ADA does not require employers to create a new position for a disabled employee who can no longer perform the essential functions of her job. Under the ADA, where an

employee is unable to perform the essential functions of her job, termination is lawful. *See, e.g., Smith v. Ameritech,* 129 F.3d 857, 867 (6th Cir. 1997). And where a plaintiff's "own doctor," not the defendant, "has concluded she could not perform her job . . . [that plaintiff] cannot establish that she is a 'qualified individual with a disability' under the ADA." *Weigel v. Target Stores,* 122 F.3d 461, 467 (7th Cir. 1997).

Dietelbach never proposed an accommodation. Instead, she simply asserted, without proof, that she could perform the tasks of an Electrical I&T-A, an assertion directly contradicted by all medical evidence. The medical opinions of Dietelbach's physician, Dr. Nahigian, and of Ohio Edison's medical consultant. Dr. Newman, were the only evidence presented on the subject of Dietelbach's ability to perform the essential functions of her job. During his deposition, Dr. Nahigian stated that the limits that he placed on her duties in August 1996 were permanent, and that she could only perform light duty work. And Drs. Nahigian and Newman explicitly said that Dietelbach could not perform the essential tasks of an Electrical I&T-A. Specifically, Dr. Nahigian stated that Dietelbach was "done as a factory worker":

> [Dietelbach] cannot do anything that has to have powerful thumbs, powerful grip, repetitive lifting and grasping, certainly nothing that had any kind of pneumatic tools or any torqueing with heavy screwdriver's [sic] or wrenches, anything that would demand where there would be a lot of strain on her thumbs, strain on her hands. The power is gone. The thumb is 50 percent of her hand and

> neither one of her thumbs are going to be good enough to do that kind of heavy work.

Job duties performed by an Electrical I&T-A, including splicing cable, repairing equipment, and handling heavy equipment, require that an Electrical I&T-A have full use of her hands and, hence, her thumbs. Dietelbach did not have full use of her hands.

Because Dietelbach failed to establish a genuine issue of material fact as to whether she was qualified to perform the essential functions of an Electrical I&T-A, summary judgment in favor of Ohio Edison was appropriate.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed September 13, 1999]

No. 5:98CV400

SHIRLEY DIETELBACH, *Plaintiff*,

v.

OHIO EDISON COMPANY, *Defendant*.

JUDGE DONALD C. NUGENT

MEMORANDUM OPINION AND ORDER

This matter is before the Court pursuant to the Motion of Defendant Ohio Edison Company ("Ohio Edison") for Summary Judgment (Document #24). For the reasons that follow, Defendant's Motion is GRANTED in part.

Procedural History

This action was originally filed in the Court of Common Pleas for Trumbull County, Ohio. Ohio Edison removed the action to this Court on February 17, 1998. Plaintiff's Complaint alleges claims for Handicap Discrimination in violation of Ohio Revised Code § 4112.99; violation of Ohio public policy; and "Disability" Discrimination in Employment under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(a). Plaintiff filed an Amended Complaint adding a fourth claim captioned "Statutory Workers' Compensation Retaliatory Discharge Claim" alleging that Defendant terminated Plaintiff in retaliation for filing and maintaining certain workers' compensation claims in violation of Ohio Rev. Code §4123.90.

Factual Background[1]

Plaintiff had been employed by Ohio Edison for over 30 years when she was terminated effective January 31, 1997. Plaintiff began her career at Ohio Edison in 1964 in the Niles, Ohio generating plant where she worked as a lab tester until 1978. Plaintiff became an instrument & test employee ("I&T") in 1979. An I&T checks and repairs gauges and other instruments such as recorders. Plaintiff advanced through the levels of I&T until she became an I&T-A in 1984. Plaintiff's job classification was changed to electrical I&T-A

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[1]The factual summary is based on the parties' statements of fact. Those material facts which are controverted and supported by deposition testimony, affidavit or other evidence are stated in the light most favorable to Plaintiff, the non-moving party.

in June 1995 in a plant reorganization. Two jobs (electrical maintenance and I&T) were combined. The electrical maintenance component included cleaning and repairing trippers, breakers, fans and motors. The job specifications for the electrical I&T-A position included the installing and repairing of electrical and instrument and control equipment and performing rigging work which requires the handling of heavy electrical equipment. Plaintiff had an excellent attendance record in 1994 and her supervisor evaluated her job performance as an electrical I&T-A employee as "good" in June, 1995.

Plaintiff injured her thumbs at work on October 6, 1995. Plaintiff went to the emergency room for treatment on October 31, 1995. She returned to work the next day on a "modified light duty" basis. While on light duty, Plaintiff performed job demonstrations; worked on recorders; and worked in the lab. None of the tasks performed by Plaintiff while working on light duty constituted a full-time job at the plant. At that time there were only six non-management job titles at the Niles plant and none of the collection of light duty tasks performed by Plaintiff corresponded to a job title existing at the plant.

Plaintiff was treated by Stanley H. Nahigan, M.D. for her thumb injuries from January 9, 1996, until her last treatment on December 20, 1996. Dr. Nahigian operated on Plaintiff's right thumb on April 24, 1996. Plaintiff was off work between April 24, 1996 through July 22, 1996, and was awarded workers compensation benefits for the period that she was off work.

Dr. Nahigian cleared Plaintiff for return to work on July 22, 1996, restricting her activity to "suitable one-handed duty until Monday, August 12, 1996, at which time she may return to regular duty." Dr. Nahigian imposed additional restrictions in August, 1996, prohibiting Plaintiff from opening valves or jars, climbing ladders, or lifting more than 5 pounds. Dr. Nahigian allowed that Plaintiff could work on small instruments and records with her left hand and use a small screw driver and pliers with her left hand.

Ohio Edison's medical consultant, Dr. Timothy Newman, contacted Dr. Nahigian after the August, 1996 limitations were imposed. In his memorandum summarizing his conversation with Dr. Nahigian, Dr. Newman notes that Dr. Nahigian confirmed that Plaintiff had reached maximum medical improvement as to her thumb injuries and that the August 1996 restrictions were permanent.

In his deposition, Dr. Nahigian stated:

> She's done as a factory worker, she's finished. She cannot do anything that has to have powerful thumbs, powerful grip, repetitive lifting and grasping, certainly nothing that had any kind of pneumatic tools or any torqueing with heavy screwdriver's or wrenches, anything that would demand where there would be a lot of strain on her thumbs, strain on her hands. The power is gone.
>
> The thumb is 50 percent of her hand and neither one of her thumbs are going to be good enough to do that kind of heavy work.

(Nahigian Dep. at pp.38-39). Dr. Nahigian further noted that he would not advise Plaintiff to return to the type of work she previously performed, but she could if she wanted to. *Id.* While Dr. Nahigian noted that Plaintiff may improve with some strength therapy, he did not have any records pertaining to Plaintiff's physical therapy. As of December, 1996, when Dr. Nahigian last saw Plaintiff, it was his medical opinion that she required the same restrictions that he imposed in August, 1996. In his deposition, Dr. Nahigian agreed with the statement that Plaintiff could only do light duty work, with minimal use of her hands and volunteered that these limitations were "forever".

In November 1996, each of the six job titles that existed at the Defendant's Niles, Ohio generating plant had physical requirements similar to Plaintiff's electrical I & T-A job. Based upon the opinions of Dr. Nahigian and Dr. Newman, Defendant determined that Plaintiff was unable to return to work at the Niles plant. Plaintiff was transferred to the "extended disability area" on November 20, 1996. By letter dated December 13, 1996, Defendant informed Plaintiff of her early retirement and disability retirement options. Plaintiff's termination became effective January 31, 1997. Plaintiff filed for and received Social Security Disability benefits for her thumb injuries.

Defendant moved for summary judgment on all of Plaintiff's claims on May 14, 1999. Plaintiff filed a Memorandum Contra Defendant's Motion for Summary Judgment on June 17, 1999. Defendant filed a Reply Brief in Support of its Motion for Summary Judgment on June 22, 1999. The motion is now fully briefed and ready for decision.

Summary Judgment Standard

Summary judgment is appropriate where the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The burden of showing the absence of any such "genuine issue" rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact.

Celotex v. Catrett, 477 U.S. 317, 323 (1986)(citing FED. R. CIV. P. 56(c)). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. The court will view the summary judgment motion "in the light most favorable to the party opposing the motion." *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), *see also U.S. v. Hodges X-Ray, Inc.*, 759 F.2d 557, 562 (6th Cir. 1985).

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of their case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex*, 477

U.S. at 322). Accordingly, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Copeland v. Machulis,* 57 F.3d 476, 478 (6th Cir. 1995) (quoting, *Anderson,* at 248-49 (1986)). Moreover, if the evidence presented is "merely colorable' and not "significantly probative," the court may decide the legal issue and grant summary judgment. *Anderson,* 477 U.S. at 249-50 (citation omitted). In most civil cases involving summary judgment, the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252. However, if the non-moving party faces a heightened burden of proof such as clear and convincing evidence, it must show that it can produce evidence which, if believed, will meet the higher standard. *Street v. J..C. Bradford & Co.,* 886 F.2d 1472, 1479 (6th Cir. 1989).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmover. The nonmoving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox v. Kentucky Department of Transportation,* 53 F.3d 146,149 (6th Cir. 1995). The text of FED. R. CIV. P. 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific

> facts showing that there is a genuine issue for trial.

Id. The Federal Rules identify the penalty for the lack of such a response by the nonmoving party as an automatic grant of summary judgment, where otherwise appropriate.

Though parties must produce evidence in support of and in opposition to a motion for summary judgment, not all types of evidence are permissible. The Sixth Circuit has concurred that, "'it is well settled that only admissible evidence may be considered by the trial Court in riding on a motion for summary judgment.'" *Wiley v. U.S.*, 20 F.3d 222 (6th Cir. 1994) (quoting *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988)). FED. R. CIV. P. 56(e) also has certain, more specific requirements:

> [it] requires that affidavits used for summary judgment purposes be made on the basis of personal knowledge, set forth admissible evidence, and show that the affiant is competent to testify. Rule 56(e) further requires the party to attach sworn or certified copies to all documents referred to in the affidavit. Furthermore, hearsay evidence cannot be considered on a motion for summary judgment.

Wiley, at 225-26 (citations omitted). However, evidence not meeting this standard may be considered by the district court unless the opposing party affirmatively raises the issue of the defect. The burden is on the opposing party to object to the improper evidence; failure to object constitutes a waiver.

> If a party fails to object before the district court to the affidavits or evidentiary materials submitted by the other party in support of its position on summary judgment, any objections to the district court's consideration of such materials are deemed to have been waived, and [the Sixth Circuit] will review such objections only to avoid a gross miscarriage of justice.

Id. at 226 (citations omitted).

As a general matter, the district judge considering a motion for summary judgment is to examine "[o]nly disputes over facts that might affect the outcome of the suit under governing law." *Anderson,* 477 U.S. at 248. The court will not consider non-material facts, nor will it weigh material evidence to determine the truth of the matter. *Id.* at 249. The judge's sole function is to determine whether there is a genuine factual issue for trial; this does not exist unless "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.*

In sum, proper summaryjudgrnent analysis entails:

> the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson, 477 U.S. at 250.

Law and Argument

Defendant moves for summary, judgment on all four counts of Plaintitt's Amended Complaint.

I. ADA and Ohio Rev. Code § 4112 claims[2]

The ADA prohibits an employer from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a).

"Disability" is defined in the statute as follows:

> The term "disability" means, with respect to an individual--

---

[2]Since Plaintiffs handicap claim brought pursuant to Ohio Rev. Code Chapter 4112 is based on the same facts and circumstances as her ADA claim, the claims will be considered together. "The essential elements of a claim brought under the ADA and the Ohio handicap discrimination statute are the same. Therefore, the case law regarding claims brought under the ADA applies equally to claims brought under the Ohio Statute." *Hoffman v. Fidelity Brokerage Servs., Inc.* 959 F. Supp. 452, 457 n. 1 (S.D. Ohio 1997)(citation omitted); *see also City of Columbus Civil Serv. Comm 'n v. McGlone,* 697 N.E. 2d 204, 206-07 (Ohio 1998("The federal [ADA] is similar to the Ohio handicap discrimination law . . . . We can look to regulations and cases interpreting the federal Act for guidance in our interpretation of Ohio law.").

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. §12102(2).

Plaintiff argues that she is not disabled but that Defendant regarded her as being disabled. Under the "regarded as" prong of the statute, an individual need not actually have a physical impairment, as long as that individual is "regarded as having such an impairment." 42 U.S.C. §12102(2)(C).

In order to establish a prima facie case under the ADA, a plaintiff must demonstrate the following:

> (1) that she is, or is perceived to be, disabled within the meaning of the Statute;
> (2) that she is otherwise qualified for the job; and
> (3) that she was discriminated against on the basis of her disability.

Andrews v. State of Ohio, 104 F.3d 803, 807 (6th Cir. 1997). With respect to the first prong of the prima facie case, "disability" is defined in the statute in pertinent part as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual". 42 U.S.C. §12102(2)(A). Thus, in order to establish the first element of the prima facie case Plaintiff must present some

evidence that Plaintiff has a physical impairment (or that Defendant perceived her to have a physical impairment) which substantially limits her performance of a major life activity. *See, Andrews, supra,* 104 F.3d at 808. Working is considered a major life activity. See 29 C.F.R. 1603.2.

In support of her contention that Defendant regarded Plaintiff as having a statutorily protected disability, Plaintiff points to a statement made in Defendant's position statement to the OCRC as follows:

> Consequently, the next issue to face was whether, given her [SHIRLEY's] permanent conditions and restrictions, she could perform the essential functions of her job with or without a reasonable accommodation.

Plaintiff contends that Defendant did not have to reach the issue of whether Plaintiff could do her job with an accommodation if it did not consider her to be disabled. In addition, Plaintiff asserts that on November 8, 1996, Defendant "insisted that SHIRLEY needed 'accommodations, in another job, and hinted that there 'may be no job for you'; that Defendant characterized Plaintiff as "disabled with carpal tunnel in both hands, etc.; and that Defendant sent Plaintiff a termination letter dated December 13, 1996, in which Defendant included Plaintiff in "that class of employees 'who have been unable to work for an extended period of time due to illness or injury;'" indicated that Plaintiff had "reached maximum medical improvement and will be unable to return to employment with Ohio Edison" and suggested that Plaintiff apply to her local Social Security Administration office to

determine whether she qualified for a Social Security disability benefit.

Defendant counters that its submission to the OCRC and its December 13, 1996, letter to Plaintiff explaining her early retirement and disability retirement options did not assert its belief that Plaintiff was disabled within the meaning of the ADA, but rather, the documents referenced Plaintiff's inability to perform the essential functions of her job. While Plaintiff certainly has a physical impairment which prevents her from performing all of the functions of her job, Defendant contends that Plaintiff is not disabled within the meaning of the ADA because her physical impairments do not substantially limit a major life activity. Defendant points to the deposition testimony of its medical consultant Dr. Newman who opined that Plaintiff does not have a condition which limits any major life activity. Defendant also asserts that the author of the a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F. 3d 369, 372 (6th Cir. 1997) *citing* 29 C.F.R. §1630.2(j)(3)(1).

Defendant denies that it believed that Plaintiff's physical impairment substantially limited Plaintiff's ability to work, only that her physical impairment prevented her from performing any of the jobs available at its Niles plant. There is no evidence supporting Plaintiff's contention that Defendant regarded Plaintiff as being disabled within the meaning of the ADA. Colloquial references to the terms "disabled" or "disability" do not demonstrate that Defendant regarded

Plaintiff as being substantially limited in one or more major life activity. *See Hoskins, supra,* 44 F. Supp. 2d at 891. Accordingly, Plaintiff has failed to establish the first element of the prima facie case.

Even if Plaintiff could demonstrate that Defendant regarded her as being disabled within the meaning of the ADA, she does not demonstrate that she is qualified to perform the essential functions of her job, with or without accommodation. Plaintiff's treating physician imposed several limitations on Plaintiff's return to work which preclude her from performing all of the tasks of an electrical I&T. Those limitations were not removed by Plaintiff's physician and it is his opinion that her physical condition is permanent and will not substantially improve. Defendant's medical consultant agrees with the opinion of Plaintff's physician. While Plaintiff asserts, without any medical support or other proof, that she can perform the physical requirements of her position, her assertions are directly contradicted by her treating physician and Defendant's medical consultant. Certainly, employers may not require or force employees to perform tasks which their physicians say they cannot safely perform. Similarly, it is unfair to ask Defendant to allow Plaintiff to perform tasks which her treating physician has specifically limited her from performing. Plaintiff does not have the final word on whether she is qualified to perform her job. By her own doctor's orders, Plaintiff was not qualified to perform her job at the time of her involuntary retirement. *See Matthews v. Commonwealth Edison Co.,* 128 F. 3d 1194, 1195 (7th Cir. 1997). (An individual who cannot perform the essential functions of a job is not "qualified" and the ADA does not come into play. "It is irrelevant that the lack of qualification is due entirely to a disability.")

Moreover, there is no evidence that Plaintiff requested any reasonable accommodation from Defendant in order to perform her job. It is up to the employee to request an accommodation. See 42 U.S.C. §12101 (2).

Since Plaintiff has been unable to show that she has a "disability" as defined in the ADA and/or because she is not qualified to perform her job with or without reasonable accommodation, Defendant is entitled to summary judgment on Plaintiff's ADA claim as well as her claim of handicap discrimination pursuant to Ohio Rev. Code § 4112.02.

II. State Law Claims

In addition to her ADA and Ohio Rev. Code §4112 claims, Plaintiff has asserted claims for violation of Ohio's public policy and for retaliatory discharge pursuant to Ohio Rev. Code §4123.90. Under the supplemental jurisdiction statute, 28 U.S.C. §1367, district courts are permitted to dismiss pendent state law claims if all federal claims have been dismissed. The Sixth Circuit has stated that "generally, if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." *Hankins v. The Gap, Inc.*, 84 F.3d 797, 803 (6th Cir. 1996) (inner quotes and citations omitted); *see also United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). As the Court has granted summary judgment on Plaintiff's federal law claim, as well Plaintiff's Ohio Rev. Code § 4112 claim (which was entwined with Plaintiff's ADA claim), the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims.

This matter was removed from state court to federal court. Regarding removal cases, the United States Code

provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. §1447. Now that this Court has dismissed the federal claim and declines to exercise supplemental jurisdiction, this Court lacks jurisdiction over Plaintiff's remaining state law claims. Accordingly, Plaintiff's state law claims under Ohio public policy and Ohio Rev. Code §4123.90 are remanded to the Court of Common Pleas for Trumbull County, Ohio for further proceedings. See *Good v. Ohio Edison Co.*, No. 3:96 CV 7040, 1996 WL 652599, at *6 (N.D. Ohio July 12, 1996)(unpublished)("The state courts are better suited to deal with issues of state law, and remand of the remaining claims to state court will not unduly prejudice the parties.").

Conclusion

For the foregoing reasons, the Court finds that Defendant is entitled to judgment according to law as to Plaintiff's ADA and Ohio Rev. Code § 4112 claims. Defendant's Motion for Summary Judgment (Document #24) is GRANTED as to the ADA and Ohio Rev. Code § 4112 claims, and those claims are DISMISSED. Plaintiff's remaining state law claims are REMANDED to the Court of Common Pleas for Trumbull County, Ohio for further proceedings.

IT IS SO ORDERED.

/s/_____
DONALD C. NUGENT
United States District Judge

DATED: September 13, 1999

IN THE UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed September 13, 1999]

No. 5:98CV400

SHIRLEY DIETELBACH,
Plaintiff,

v.

OHIO EDISON COMPANY,
Defendant.

JUDGE DONALD C. NUGENT

JUDGMENT

Pursuant to a Memorandum Opinion and Order of this Court, the Motion of Defendant Ohio Edison Company ("Ohio Edison") for Summary Judgment (Document #24) is GRANTED IN PART. Plaintiff's federal law claim and Ohio Rev. Code §4112 claim are DISMISSED. Plaintiff's state law claims under Ohio public policy and Ohio Rev. Code §4123.90 are REMANDED to the Court of Common Pleas for Trumbull County, Ohio.

IT IS SO ORDERED.

/s/_____
DONALD C. NUGENT
United States District Judge

DATED: September 13, 1999

Supreme Court, U.S.
F I L E D
MAY 29 2001

No. 00-1568

IN THE

Supreme Court of the United States

SHIRLEY DIETELBACH,

Petitioner,

v.

OHIO EDISON COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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PETITIONER'S QUESTION PRESENTED FOR REVIEW

Whether, on summary judgment review of the " 'qualified' individual with a disability" issue in an ADA action where the medical evidence conflicts with the discharged employee's "I can do my job" testimony, genuine issue of material fact exists where the employer never provided the employee an opportunity to perform her position's essential functions with or without reasonable accommodation.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Ohio Edison Company, is a wholly owned subsidiary of FirstEnergy Corp.

STATEMENT OF THE CASE

In October 1995, Petitioner was employed at a power plant owned by Respondent ("Ohio Edison") as an electrical instrument & test worker — A Classification ("Electrical I&T-A). There are significant physical demands for the I&T-A position involving pushing, pulling, lifting and finger manipulation. Petitioner's responsibilities included installing and repairing electrical and control equipment, and performing rigging work requiring the handling of heavy electrical equipment. Petitioner was injured at work on October 6, 1995 while she was rodding out an ash line at the power plant. Following Petitioner's treatment at an emergency room for complaints of pain in her hands, she was placed on temporary light duty.

Stanley Nahigian, M.D. treated Plaintiff and evaluated her injury throughout 1996. He operated on Petitioner's right hand in April 1996. Following a two month convalescence, Petitioner returned to temporary light duty at the Plant. In August 1996, Dr. Nahigian placed significant physical limitation restrictions on Petitioner, prohibiting her from opening valves or jars, climbing ladders, or lifting more than five pounds. Dr. Nahigian subsequently opined these restrictions are permanent.

None of the light duty tasks performed by Petitioner constituted a full-time job at the Plant. Of the non-management jobs actually existing at the facility, all of them had physical requirements at least as demanding as Petitioner's job as an Electrical I&T-A. When asked what type of work Petitioner could perform, her physician opined:

> **She's done as a factory worker, she's finished. She cannot do anything that has to have powerful thumbs, powerful grip, repetitive lifting and grasping, certainly nothing that ha[s] any kind**

> **of pneumatic tools or any torqueing with heavy screwdrivers or wrenches, anything that would demand where there would be a lot of strain on her thumbs, strain on her hands. The power is gone.**

Dr. Nahigian also opined that Petitioner reached "maximum medical improvement" during her course of treatment in November 1996. Based on his treatment and evaluation of Plaintiff's condition, Dr. Nahigian opined Petitioner's medical condition rendered her incapable of performing the tasks associated with her job as an Electrical I&T-A.

Ohio Edison's medical consultant confirmed the findings and conclusions of Plaintiff's treating physician. Based on the medical evidence, Ohio Edison determined that Petitioner's condition prevented her from performing her job, and the other jobs actually existing at the Plant. The record contains no medical or objective evidence indicating Petitioner is capable of performing the essential functions of her job. It is uncontroverted that Petitioner never requested any accommodation.

Ohio Edison's employment policy required Petitioner's termination because she had achieved maximum medical improvement and could not perform her job. There is no evidence that Petitioner's termination was a result of anything other than the normal application of Ohio Edison's employment policy. Petitioner's termination became effective in January 1997. Petitioner applied for and obtained social security disability benefits after her termination.

Petitioner commenced suit in state court in January 1998. The case was removed to the United States District Court in February 1998. In September 1998, the District Court granted summary judgment in favor of Ohio Edison against Petitioner's

federal ADA claim and a parallel state statutory claim. The summary judgment was affirmed by the United States Court of Appeals for the Sixth Circuit in January 2001.

REASONS FOR DENYING THE WRIT

Petitioner's argument to invoke this Court's jurisdiction is trivial, if not frivolous. The case lacks any issue meriting further review.

Petitioner focuses her attack on the findings now made by two courts that no reasonable fact finder could conclude she is a "qualified individual" under the ADA. Both courts based their findings on the opinions of Petitioner's treating physician, and the fact that these opinions were uncontroverted by medical evidence. Petitioner takes the absurd position that she can create a triable issue as to whether she is a "qualified individual" by simply denying her own treating physician's opinions, baldly asserting that she *is* able to perform the essential functions of her job.

Petitioner's position is similar to the position taken by the Plaintiff in *Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997). In that case, the plaintiff unsuccessfully attempted to demonstrate a triable issue on the question of whether she was a "qualified individual" under the ADA with an affidavit sworn by her psychologist. On review, the Seventh Circuit disagreed, finding that the psychologist's sworn statement regarding plaintiff's ability to return to work constituted ". . . nothing more than a naked conclusion unsupported by any factual foundation". *Id.* at 468. Petitioner's position is no less speculative in this case. Her self-serving assertion is completely unsupported by any factual foundation, leaving a reviewing court with no basis for finding probative value in the assertion.

Contrary to Petitioner's argument, her contention does *not* raise any issue of significance relating to the circumstances under which court should defer to the reasonable medical judgment of private physicians on which employers rely. This case, for example, does not involve a conflict between the employer's physician/consultant and the employee's treating physician. There was complete agreement in this case between Ohio Edison's medical consultant and Petitioner's treating physician. Based on their independent evaluations of Petitioner, they concluded she is incapable of performing the essential functions of her job. Petitioner failed to challenge these conclusions with any medial evidence. This unanimity alone removes any rational basis for a court to second-guess the medical evidence in this case.

Petitioner also is incorrect in suggesting that her argument raises a new or novel issue requiring judicial resolution. One recent case with comparable facts is *Mazza v. Bratton*, 108 F. Supp. 2d 167 (E.D.N.Y. 2000), *affirmed*, __ F.3d __ (2d Cir. 2001) (Table, 2001 WL 363513). In that case, "[p]laintiff maintained that he would have been able to work with only the accommodation of being allowed to use bathrooms as needed". *Id.* at 170. His treating physician opined that plaintiff would be able to resume his previous duties with some accommodations if he responded favorably to the intensive medical therapy he was then undergoing. *Id.* at 172. The district court discounted the probative value of the treating physician, finding that it essentially confirmed the evaluation of the employer physician's that Plaintiff's prognosis was poor. *Id.* at 175. Like Petitioner, plaintiff in *Mazza, supra,* asserted he was able to work at the time in question. *Id.* The district court expressly rejected this assertion, finding that "plaintiff cannot salvage his claim with his bald assertion of a belief that he was able to work at the time, unsupported by any medical or other objective evidence". *Id.*

The rationality of the outcome in *Mazza*, *supra* — and in this case — is readily apparent. Petitioner essentially is arguing that the employer should accept her self-serving, unsubstantiated assertion over the opinions of her own treating physician, completely disregarding the objective medical evidence. Petitioner's reasoning defies common sense. If Petitioner's position were the rule, there would be no reason to have medical evaluations for an injured employee; so long as the employee claimed to be able to perform her job, then she would be permitted to proceed with her tasks regardless of safety. Plainly, this would lead to disastrous consequences in many instances. Petitioner's proposal allowing injured employees to overrule their treating physician's opinions also would lead to increased volumes of frivolous cases as the employee claiming a remedy under the ADA could always establish she is a "qualified individual" by merely denying the opinion of her treating physician.

Petitioner claims her goal is to find a "fair and pragmatic method" for resolving disputes between injured employees and their treating physicians. In fact, the only reason Petitioner is attempting her nonsensical quest is to evade summary judgment.

CONCLUSION

For these reasons, the Court should deny certiorari.

Respectfully submitted,

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